No. 842

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRYE-BRUHN COMPANY, a corporation,
Appellant,

vs.

HERMAN MEYER et al., *Appellees.*

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BRIEF OF APPELLANT

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STATEMENT OF CASE.

This is an appeal, under Section 507, page 252, of the Code of Alaska, from an interlocutory order dissolving a temporary injunction restraining appellee Meyer from enforcing a judgment recovered by him against appellant until the determination of this suit, which was instituted by appellant against Meyer to set off reciprocal judgments. The temporary injunction was dissolved to the extent of allowing the attorneys who had recovered

the judgment in favor of appellee Meyer against appellant to withdraw from the registry of the court the sum of one thousand dollars as an attorney's fee for procuring that judgment.

On June 28, 1899, Charles H. Frye recovered in the Superior Court of the State of Washington for King County a judgment against the appellee Herman Meyer for the sum of $3140.10 with interest and costs (R. 5-6). This judgment, although recovered in the name of Frye, was recovered by him as trustee for the appellant company, a corporation, of which he was president, and was assigned by him to the corporation on the 27th day of January, 1900 (R. 7. 23-24).

On March 21st, 1902, the appellee Meyer, in cause No. 849 in the District Court of Division 1 of the District of Alaska, recovered judgment against appellant for 45 per cent of $6295.00, after paying the costs in said suit (R. 7-8). In said cause No. 849 there had been paid into the registry of the court the sum of $3857.50, proceeds of sale of certain property involved in said suit, which said sum was ordered to be retained in the registry of the court until paid out under the decree in said cause (R. 12-13). On the same day that Meyer recovered judgment against appellant, appellant brought a suit in equity, in the same court rendering said judgment, upon the judgment recovered by Frye in the State of Washington against Meyer. In the suit brought by appellant in the District Court of Alaska, it alleged in its complaint the recovery of the judgment by Frye against Meyer, the assignment of the judgment by Frye to it on the 27th day of January, 1900, the issuance of an execution in the

State of Washington against Meyer and a return of *nulla bona*, the recovery by Meyer of a judgment against appellant, the existence of money in the registry of the court applicable to the payment of said judgment, the insolvency of Meyer, and that Meyer had threatened to, and unless prevented would, assign said judgment, and that execution thereon would be issued (R. 4-11). The complaint prayed the issuance of a temporary injunction restraining Meyer from assigning the judgment and from causing execution to be issued thereon, and that the clerk of the court be ordered to refrain from paying out any money in cause No. 849 until the further order of the court. It also prayed that the above mentioned judgments be set off one against the other, and that on such set off, if there should be any deficiency in favor of appellant, it should have judgment therefor against Meyer (R. 10-11). The application for an injunction was supported by affidavit (R. 11-12). The District Court of Alaska, on the same day that said complaint was filed, granted the injunction prayed for (R. 14-15). On April 11, 1902, Malony & Cobb, attorneys at law, who had recovered the judgment in favor of Meyer against appellant in cause No. 849, filed a motion in cause No. 154, being the cause instituted by appellant against the appellee Meyer, to off-set the said judgments, and by said motion sought to have the injunction which had been granted dissolved to the extent of allowing them to withdraw from the registry of the court the sum of $1000.00, for which amount they claimed a lien on the judgment in cause No. 849 (R. 19-20). This motion was based upon the affidavit of J. H. Cobb, in which he averred that it had been agreed

between Meyer and Malony & Cobb that for their services as attorneys in said cause No. 849 Malony & Cobb should be paid $1000.00 and an additional amount dependent on certain contingencies; that $1000.00 was due and payable to them, and that they were entitled to a lien therefor upon the judgment recovered in cause No. 849 (R. 20). Appellant filed its objection to the modification prayed for, and objected to the consideration of the application for said modification, on the ground that the court had no jurisdiction to act in the matter on said application (R. 21). Appellant also filed an affidavit of its agent showing that the judgment recovered in the name of C. H. Frye against the appellee Meyer in the State of Washington had been recovered by Frye in trust for appellant on an indebtedness which existed in favor of appellant against Meyer before the action of Meyer against the appellant had been commenced (R. 23-24). On the 15th day of April, 1902, the court granted the motion of Malony & Cobb and dissolved the temporary injunction theretofore granted, so as to allow Malony & Cobb to withdraw from the registry of the Court the sum of $1000.00 in cause No. 849 (R. 22). Appellant excepted to said order, appealed therefrom, its appeal was allowed, it duly filed its assignments of error, and executed its *supersedas* bond which was approved by the Court (R. 28-36). The assignments of error are as follows:

"First. That the court erred in overruling plaintiff's objections filed herein to the motion filed by Malony & Cobb to modify the restraining order made and entered by this court on the 21st day of March, 1902; and erred in the consideration of said motion of Malony & Cobb,

over the objections filed herein by said plaintiff as aforesaid.

"Second. The court erred in granting the order to modify the injunction granted herein on the 21st day of March, 1902, so that the same would not restrain Malony & Cobb from withdrawing from the funds in court one thousand dollars ($1000), which said order modifying said injunction or restraining order was made and entered herein on the 15th day of April, 1902, and on motion of the said Malony & Cobb based upon the affidavit of J. H. Cobb and the files in this cause."

Appellant relies on the following specifications of error for the reversal of the order of the court of the 15th day of April, 1902, dissolving the temporary injunction:

First. The court erred in considering in cause No. 154 the motion of Malony & Cobb for the dissolution of the temporary injunction granted in that cause, because Malony & Cobb were not parties to that suit and had not intervened therein, and also in adjudicating their right to a lien in advance of a trial.

Section 41, page 151, of the Code of Alaska is as follows:

"Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter of litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint setting forth the ground upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attor-

neys of the parties who have appeared, who may answer or demur to it as if it were an original complaint."

We do not think that any case can be found wherein a suit brought for the purpose of setting off one judgment against another, and where an attorney claimed a lien paramount to the rights of the party seeking the set-off, such claim was made by motion. The enforcement of the lien must be on intervention by the attorney or by a new suit. Where the question of the right of lien is to be determined between the plaintiff and his attorney only, or where the right of an attorney to a lien is to be determined where his client has settled the cause with the defendant, a motion in the original case may be proper, but in all other cases a new suit or an intervention is necessary. The Alaska Code (Section 41, p. 151) requires an intervention.

In the case of Patrick vs. Leech and others, 17 Fed. R. 476, certain attorneys petitioned for the establishment of their lien upon a judgment. Their right to a lien was disputed by the defendants in the case, on the ground that no notice of lien had been given. It was claimed by the petitioners that such notice had been given, and the court held that there was an issue to be tried. The court held that the only way in which the petitioners could appeal from the ruling of the court holding that they had no lien was by taking an appeal from the final decree, and therefore it ordered the petitioners made parties to the cause. In the case now before the court, Malony & Cobb filed a motion in a case in which they had never appeared, and undertook to assert rights in behalf of themselves, and the court, without any trial of that ques-

tion, granted them the relief prayed for. We submit that the court was without jurisdiction to determine any of the claims of Malony & Cobb until they had obtained a standing in the case by intervening therein.

Second. The court erred in dissolving the temporary injunction to the extent of allowing Malony & Cobb to withdraw $1000 from the registry of the court, for the reason that Malony & Cobb had no lien upon said judgment at the time the temporary injunction was granted.

The Code of Alaska, Section 742, page 298, so far as applicable to the case now before the court, is as follows:

> "An attorney has a lien for his compensation, whether specially agreed upon or implied, as provided in this section. * * * * Third. Upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed, *from the time of giving notice of the lien to that party.*" (Italics ours). "Fourth. Upon a judgment to the extent of the costs included therein, or if there be a special agreement, to the extent of the compensation specially agreed on, *from the giving notice thereof to the party against whom the judgment is given and filing the original with the clerk where such judgment is entered and docketed. This lien is, however, subordinate to the rights existing between the parties to the action or proceeding.*" (Italics ours.)

As above stated, the judgment recovered by Frye in the State of Washington, which was recovered in his name though in fact as trustee for appellant, was recovered prior to the recovery of the judgment by appellee Meyer against appellant. It was assigned by Frye to appellant prior to the recovery of the judgment by Meyer against appellant. On the same day that Meyer recovered his judgment against appellant, appellant filed its bill in

equity against Meyer in the District Court of Alaska for the set-off of said judgments, and obtained the restraining order above mentioned. The judgment in favor of Meyer was recovered March 21, 1902. It was not until the 11th day of April, 1902, that the motion of Malony & Cobb was filed. The record shows that Malony & Cobb had no lien upon the judgment recovered by Meyer against appellant. They did not give any notice of lien to appellant, nor did they file the original of any notice of lien with the clerk where the judgment was entered. It is clear beyond dispute that as against the appellee Meyer the appellant had the right to set-off the judgment it owned against Meyer, against the judgment owned by Meyer against it. It is unnecessary to cite many cases to establish this proposition, for it is so elementary that it is laid down in the text books as a rule firmly established.

"Where reciprocal claims between different parties have passed into judgment, it is the established practice of the courts to set-off one judgment against another and enter satisfaction of both to the amount of the smaller demand, and judgment for one party may be withheld until the other by using due diligence may obtain his judgment, so that the one may be set-off against the other, or that the one execution may balance the other."

Am. & Eng. Ency. of Law, 1st ed., Vol. 22, p. 445.

"The power to set-off one judgment against another does not rest upon any statute, but upon the general jurisdiction of courts over their suitors, and their general superintendence of proceedings before them."

Same work, p. 446.

"JUDGMENTS IN DIFFERENT COURTS. Formerly judgments recovered in different courts could

be set-off against each other in equity only, but it is now settled that mutual judgments may be set-off against each other either at law or in equity, whether obtained in the same or different courts. Thus judgments in different districts of the same court may be set-off against each other, and a judgment of an inferior court may be set-off against one of a superior court, and a judgment in the courts of one of the states and one of a federal court or a court of a sister state may likewise be set-off against each other."

Same work, p. 456.

Duncan vs. Bloomstock, 2 McCord (S. C.), 318, 13 Am. Dec., 728.

Brown vs. Hendrickson, 39 N. J. L., 239.

Rix vs. Nevins, 26 Vt., 384.

Hobbs vs. Duff, 23 Cal., 596.

The proposition that in equity one judgment may be set-off against another, although the judgments may have been rendered in different jurisdictions, is so firmly established that we do not suppose it will be disputed by counsel for appellees. The only question then to be considered is whether that right of set-off is paramount to the claim of Malony & Cobb, or whether their claim is paramount to appellant's right of set-off. In this connection it must be borne in mind by the court that the decisions of the courts of states where the statute giving an attorney's lien dates that lien from the commencement of the action have no application to the case at bar. In the case at bar, the right of the attorneys of appellee Meyer to assert a lien is dependent upon compliance with the provisions of Section 742, page 298, of the Code of Alaska. That section is taken from the law of Oregon, enacted October 11, 1862, and upon comparison with the

Minnesota statute it will be found to be the same as the Minnesota statute. The third subdivision of the section is the same also as the Iowa statute. The decisions of Iowa, Minnesota and Oregon upon the meaning of the statutes of those states are therefore authoritative.

In the case of Forbush vs. Leonard, 8 Minn., 303, the question was presented whether an attorney had a lien upon the judgment recovered in the action. The court said:

"The lien of an attorney, whatever it may have been at common law, is in this state regulated by statute, and we must accordingly confine the parties to such only as the statute recognizes and enforces. The provision of the statute is contained in section 16, chapter 82, of the compiled statutes, which is in the following words: 'Sec. 16. An attorney has a lien for his compensation, whether specially agreed upon or implied, as provided in this statute: 1. Upon the papers of his client, which have come into his possession, in the course of his professional employment; 2. Upon money in his hands belonging to his client; 3. Upon money in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party; 4. Upon a judgment to the extent of the costs included therein; or, if there be a special agreement, to the extent of the compensation specially agreed on, from the time of giving notice to the party against whom the judgment is recovered. This lien is, however, subordinate to the rights existing between the parties to the action or proceeding."

The court later on in the opinion said: (Italics ours.)

"Where a lien is to be insisted on, and any person other than the client is affected thereby, it will be observed *that notice of the lien must be given.*"

And again the court said:

"By the fourth subdivision of the section above recited, where there has been a special agreement for compensation, the statute gives a lien, *after notice,* to the extent of the compensation specially agreed on."

In Dodd vs. Brott, 1 Minn., star pp. 270, 274, the court said: (Italics ours.)

"It has been urged that although the assignment" (an assignment of the judgment to the attorneys) "may be ineffectual for want of notice to Brott, still the attorneys for the plaintiff had a lien upon the judgment for the amount of the costs. There are two reasons fatal to this position. The first is, the statute does not admit of this construction. The grammatical arrangement of the section and its punctuation *leave no doubt whatever that notice to the debtor in order to effect a lien upon the judgment is necessary,* as well when the attorneys claim a lien upon the costs *as when they claim it upon a portion of the judgment by virtue of a stipulation or agreement.*"

In Crowley vs. LeDuc, 21 Minn., 412, the court held that a notice of lien was sufficient if it fairly stated the amount to which the lien claimant was entitled, but approved the case of Forbush vs. Leonard to the extent of holding that a notice was requisite. The court said:

"The notice in a case like this is sufficient if it fairly inform the party that a lien is claimed, its nature and character, for what it is claimed and upon what it is intended to be enforced."

In the case of In re Scoggin, 5 Sawyer, 549, Judge Deady assumed, as a matter about which there could be no dispute, that, under the Oregon statute, notice of the claim of lien was necessary.

In Day vs. Larsen, 47 Pac. Rep., 101, the Supreme Court of Oregon, construing the same statute incorporated in the Alaska Code, said:—

"By section 1044 of Hill's Annotated Laws it is provided that an attorney has a lien for his compensation to the extent the same may have been specially agreed on, 'from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk where such judgment or decree is entered and docketed.' These words carry their meaning plain upon their face, and fix, as the time when the lien shall attach as against the judgment debtor, the giving of notice to him, and filing the same with the clerk. The right to acquire the lien is a privilege of which the attorney may avail himself, by giving and filing the notice as required by the statute; but he has no lien or claim upon the judgment, as against the judgment debtor, prior to that time. As to him, the notice creates and originates the lien, and the statute specifically fixes the time from which it shall exist. He is a stranger to the contractual relations between the attorney and his client, and no right can be acquired against him under the statute before the prescribed notice is given."

In Jones on Liens, Vol. 1, Sec. 179, he states it to be the law in Minnesota that an attorney has a lien upon a judgment from the time of giving notice to the party against whom the judgment is rendered, and that the lien is subordinate to the rights existing between the parties to the action or proceeding. In Section 180 he states that the Oregon law is the same as the Minnesota law, except that the Oregon law requires the original notice to be filed with the clerk.

The case of Hurst vs. Sheets, 21 Iowa, 501, was decided by Judge Dillon, afterwards a judge of the Circuit Court of the United States. The question involved was whether the lien of an attorney was paramount to the right to off-set one judgment against another. At page 504 Judge Dillon says:

"The general question presented by this record and the only one argued by counsel is, whether the right to set off the sum recovered in one action against that recovered in another between the same parties, is superior to the lien of the attorney for services. Hurst obtained his judgment against Sheets the same day (June 8th) on which Sheets obtained his judgment against Hurst. In point of time, the judgment in favor of Hurst was first rendered. Perry was the attorney of Sheets, and procured his judgment for him. His services and the reasonableness of his charge therefore are not disputed. Nor is it controverted that Sheets was insolvent. It is settled, as against Sheets, that Hurst has the right to have the set-off allowed to the full amount of his judgment. Hurst v. Sheets and Trussell, 14 Iowa, 322. And the question is whether this right of Hurst to have the set-off allowed against Mr. Perry's client, equally obtains against Mr. Perry's lien as an attorney."

At page 506, the court proceeds, after citing the statute, which is substantially similar to subdivisions 2nd and third, Section 742, page 298, of the Alaska Code:

"Under this, the attorney's lien, as against the adverse party, exists only *from the time of giving him notice of the lien.* This is clear. And this fixes the time of the commencement of the lien. Now, in the case at bar, the attorney gave no *personal* notice, verbal or written, of his lien to the adverse party. The judgment in favor of the adverse party existed anterior to the judgment against him in favor of the attorney's client, and anterior to any notice (conceding, for the argument, that, from the time Hurst knew of the written notice of the attorney of his lien, which notice was pasted in the judgment docket, he would be bound by it), which he had that the attorney claimed a lien. His right of set-off existed and was matured prior to the existence of the attorney's lien, as this latter lien exists only 'from time of *giving* notice of the lien to the adverse party.' Rev. Sec. 2708. The lien of the attorney is upon what? The statute answers: It is 'upon money due his client in the hands of

the adverse party' at the time of *notice given* by the attorney, to that party, of his lien. * * * We decide this case upon the ground that the right of set-off was complete, and the amount ascertained and fixed, at and *before* the time the lien of the attorney commenced, as it began only from the time Hurst had received notice.'' (Italics the court's.)

In National Bank of Winterset vs. Eyre, 8 Fed. Rep., 733, Judge McCrary held that the right to set-off one judgment against another given by the Iowa statute could not be defeated unless it was defeated by the claim of lien of the attorneys who recovered the judgment against which it was sought to off-set the other judgment. He held that the statute in regard to set-off was declaratory of the common law and of the general principle of equity allowing mutual judgments to be set-off one against the other. He then proceeds:

''Can the right of set-off be defeated by the filing of an attorney's lien? I think not. If Eyre had assigned his entire claim before judgment to Wainwright & Miller'' (the attorneys) ''and they had sued on it, I think it clear that the assignment would have been subject to the set-off previously held by the bank. The claim was not negotiable, and the assignees would have taken it subject to any defence existing in the hands of the bank. Surely no greater right can be acquired by the filing of an attorney's lien than would have resulted from such an assignment. I think the weight of authority, as well as the better reason, supports the rule that the lien of the attorney is upon the *interest* of his client in the judgment, and is subject to an existing right of set-off in the other party.''

The Alaska Code, Subdivision 4, Section 742, *supra*, expressly makes the lien ''subordinate to the rights existing between the parties.''

In Patrick vs. Leach, 12 Fed., 661, the court, after holding that the attorney was not entitled to a lien for certain reasons, proceeded:

"If, however, I am wrong upon this proposition, I am very clearly of the opinion that no lien has been established in this case, for the reason that no sufficient notice was given under the provisions of the statute, assuming that it was applicable. The notice provided for is undoubtedly personal notice, and I think very clearly it should be in writing."

In Turner vs. Crawford, 14 Kan., star pp. 500-503, the question involved was the claim that an attorney's lien and an assignment of the judgment were paramount to the right to set-off another judgment against the judgment on which the lien was claimed. The court said:

"We do not think that the assignment of the Turner judgments to Hadley & Glick, or their attorney's lien on said judgments, can make any difference in this case. Crawford's claim and judgment existed prior to the Turner judgments, prior to the said assignment to Hadley & Glick, and prior to their attorney's lien. Turner could therefore not assign his judgments, nor the claims upon which they were rendered, nor incumber such claims or such judgments with attorney's liens, or any other kind of liens, so as to defeat Crawford's right to have his judgment or his claim compensate and pay the Turner judgments or claims."

This decision was rendered at a time when Mr. Justice Brewer was upon the bench of the Supreme Court of Kansas.

In Kansas Pacific Ry. vs. Thacher, 17 Kan., pp. 92, 100, 101, the opinion was rendered by Judge Brewer. After setting forth the Kansas statute, which is almost

verbatim subdivisions 2nd and third of Section 742 of the Alaska Code, the court proceeds:

"Again, according to the statute the lien dates from the 'time of giving notice.' Now in reference to this notice these questions arise: Must it be in writing? Is service upon the attorney of record of the adverse party sufficient? In case of a railroad corporation, upon what officer or agent should it be served? Must the amount of the lien claimed be stated? The statute is silent upon these questions; at least, it gives no specific answer to them. And yet, taking the statute in connection with other statutes, and with general rules of law, we think the matters not difficult of solution. It is a general rule, though one with perhaps some exceptions, that notices required in legal proceedings must be in writing. * * * * * The attorney is to *give notice.* By the notice thus given he seeks to create a lien upon and establish a right to receive a portion of the money due in that action to his client from the adverse party. It seems to us that it is fairly to be taken as a notice in the action or proceeding, and one which therefore must be in writing."

In the case of Fitzhue vs. McKinney, 43 Fed., 461, the Circuit Court for the Northern District of Texas had before it the question of the right of set-off of one judgment against another, and whether a claim of lien by the attorney recovering one judgment was paramount to such right of set-off. The court said:

"It can make no difference that complainant's judgments were rendered by the state courts, and the judgment against him was rendered by this court, and therefore application has to be made to this court for relief by bill in equity. If all three of the judgments had been in the state courts, where no distinction between law and equity affects cases, and the complainant would there be entitled to the relief he seeks here, he cannot lose his rights because he was sued in the circuit court. This

court has the right and power to grant him as full relief as he could get in the state courts. If the complainant had the right to have his judgments set off against the respondent's judgment, the right existed at the very instant respondent's judgment was rendered, and could not be affected by the alleged assignments of the judgment to respondent's attorneys or to Rees."

In Boston & Colorado Smelting Co. vs. Pless, 10 Pac., 652, the Supreme Court of Colorado said:

"Nor are Stuart Bros. aided by a reliance upon section 85 of the General Statutes, giving attorneys a lien for fees upon judgments obtained by them. While this lien attaches to the judgment at once upon its recovery, as between attorney and client, so that nothing more is necessary prior to the enforcement thereof against the latter by proper action, we are inclined to the opinion that, to hold the judgment debtor for the creditor's attorney's fee, the former must be notified of the attorney's intention to take advantage of the statute."

In the case of Fairbanks vs. Devereux, 58 Vt., star p. 359, the attorneys for the plaintiff sought to enforce a judgment recovered by their client against the defendant. At the time of the recovery of the judgment, the plaintiff was indebted to the defendants for a balance due on an earlier judgment in their favor against him. The defendants pleaded the judgment in their favor in set-off. The attorneys claimed that such right of set-off was subordinate to their claim of lien. The Supreme Court of Vermont said:

"As we understand, the decisions of Walker vs. Sargent, 14 Vt., 247, and McDonald vs. Smith, 57 Vt., 502, have settled this question in this state in favor of the defendants. The first named decision, while recognizing to its full extent the right of an attorney to a lien upon a judgment which he has been instrumental in recovering,

and to the fruits of such judgment for the payment of his reasonable costs and disbursements against his client and against any assignment thereof by his client, holds that the right secured to the defendant by the statute to off-set to such judgment claims which he then holds against such plaintiff is paramount to such attorney's lien.''

In Pirie vs. Harkness, 52 N. W., 581, the Supreme Court of South Dakota rendered a decision sustaining the position taken by appellant in the case at bar, by a process of reasoning which is so clear and forcible that it seems to us to be unanswerable. In that case, Harkness had recovered judgment against Pirie & Co. Pirie & Co. had a judgment against Harkness, and applied to have their judgment set-off against the judgment recovered by Harkness. The attorney of Harkness claimed a lien on the judgment recovered by Harkness against the company. After setting forth the statute of South Dakota, which is substantially similar to subdivisions second and third, Section 742, page 298, of the Alaska Code, the court said:

''The attorney's lien attaches and becomes an active instead of a potential right 'from the time of giving notice in writing to the adverse party;' but before this was done in this case appellants had openly asserted and begun to exercise their right to have these judgments set-off, by giving notice of such application to the court, as provided by statute. The attorney claiming the lien knew of this, for the notice was served upon him. When this notice was given, and appellants' right to set-off was so acted upon, the attorney's claim for lien was still only a possibility—an inchoate right. He had not yet done the very thing which, under the statute, was required to make it an operative lien, and did not do it, nor attempt to do it, until another and adverse right had attached, a right which the subsequent notice did not dis-

place. We think appellants' right to have these judgments set-off *pro tanto* attached and became operative before the notice was given, which under the statute would fix the commencement of the attorney's lien, and being prior in point of time was prior in point of right.''

Now, applying this decision to the case at bar, we see that it is directly in point. In the case at bar, the appellant was the owner of a judgment against the appellee Meyer prior to and at the time that the appellee Meyer recovered his judgment against appellant. No claim of lien was made by Malony & Cobb on the judgment recovered by Meyer until the 11th day of April, 1902. The judgment recovered by Meyer was recovered by him on the 21st day of March, 1902. On the 21st day of March, 1902, the appellant filed its bill in equity whereby it sought to set-off the judgment owned by it against Meyer, against the judgment owned by Meyer against it. At that time, Malony & Cobb had no lien, and the rights of appellant against appellee were fixed. The District Court of Alaska granted the temporary injunction prayed for by appellant, and restrained Meyer from taking any steps to enforce his judgment until the determination of the suit brought by appellant against Meyer, and also directed the clerk of the court to withhold payment of any funds in the registry of the court deposited in the case in which Meyer recovered judgment against appellant. Thereafter Malony & Cobb, without complying with the statute of Alaska by giving notice of a lien, and without taking any steps whatsoever to acquire a lien upon the judgment, made a motion in the case brought by appellant against appellee Meyer to modify the temporary injunction so as to establish a lien in favor of

Malony & Cobb paramount to appellant's right to set-off its judgment against the judgment owned by Meyer. It is perfectly clear that had Malony & Cobb remained silent, the judgment owned by appellant would have extinguished the judgment owned by Meyer. Its right to that extinguishment became a vested right when it brought suit to set-off one judgment against the other. Malony & Cobb could not ignore the statute of Alaska and displace the right of appellant to such set-off.

The order in cause 154 dissolving the temporary injunction so as to allow Malony & Cobb to withdraw an attorney fee of $1000 from the registry of the Court in cause 849, not only ignored the plain provisions of the statute fixing the date of the creation of an attorney's lien from the giving notice thereof to the judgment debtor and filing the original with the Clerk, but also the equally plain provision that:

"This lien is, however, subordinate to the rights existing between the parties to the action or proceeding."

It will be observed that this provision of the statute follows that requiring notice to be given and filed in order to create the lien. It is plain that the word "existing" has reference to the rights of the parties as they exist at the time of the creation of the lien by the giving and filing of the prescribed notice. Language could not be plainer. Now the right of appellant to set-off its judgment against the judgment of Meyer was a right existing between the parties to the action the instant that appellant instituted this suit, even if it did not exist the moment Meyer recovered his judgment against appellant. No claim is made that at the time this suit was insti-

tuted to set-off these judgments Malony & Cobb had taken any step toward acquiring a lien. Any lien acquired by them after that time, if they ever acquired one, was subordinate to the rights of the parties to the action. If Congress had intended the lien for an attorney fee to attach to a judgment as soon as the judgment should be recovered it would not have specifically provided that an attorney should have a lien on a judgment "From the giving notice thereof to the party against whom the judgment is given and filing the original with the Clerk where such judgment is entered and docketed. This lien is, however, subordinate to the rights existing between the parties to the action or proceeding." At the time appellant instituted this suit to set-off its judgment against the judgment of Meyer against it Malony & Cobb, in the language of Pirie vs. Harkness, 52 North Western Reporter, 581: "Had not yet done the very thing which, under the statute, was required to make it (the inchoate right to a lien) an operative lien, and did not do it, nor attempt to do it, until another and adverse right had attached, a right which the subsequent notice did not displace. We think appellants' right to have these judgments set-off *pro tanto* attached and became operative before the notice was given, which under the statute would fix the commencement of the attorney's lien, and being prior in point of time was prior in point of right."

The following cases also maintain the position of appellant:

Wooding vs. Crane, 11 Washington, 207.
Porter vs. Lane, 8 John., 357.
Nicholl vs. Nicholl, 16 Wendell, 447.

We therefore submit that the interlocutory order of Judge Brown, dissolving the temporary injunction whereby Malony & Cobb were allowed to withdraw from the registry of the court the sum of $1000, should be reversed with costs.

Respectfully submitted,

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For Appellant.

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